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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 561

BART LUIS CARITATIVO, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA AND FRED R. DICKSON, WARDEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED AUGUST 1, 1957.
CERTIORARI GRANTED OCTOBER 21, 1957.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 561

BART LUIS CARITATIVO, PETITIONER

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA AND HARLEY O. TEETS, WARDEN.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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1 (File endorsement omitted.)

In the Supreme Court of the State of California

In the Matter of the Application of BART LUIS CARITATIVO For a Writ of Habeas Corpus

HARLEY O. TEETS, WARDEN, CALIFORNIA STATE PRISON, SAN QUENTIN, CALIFORNIA, RESPONDENT

Petition for a writ of habeas corpus and application for stay of execution

Filed May 7, 1957

The petition of GEORGE T. DAVIS respectfully shows:

I

That he is the Attorney for the above named BART LUIS CARITATIVO, and files this petition on behalf of said BART LUIS CARITATIVO.

II

That said CARITATIVO is imprisoned, detained and restrained of his liberty by HARLEY O. TEETS, Warden of the California State Prison at San Quentin, County of Marin, California, under commitments issued out of the Superior Court
2 of the County of Marin, resulting from judgments imposing on two counts sentences of death.

III

Petitioner alleges that said detention is and will continue to be unlawful, illegal and in violation of petitioner's rights to due process and equal protection of the law as guaranteed under the 14th Amendment of the Constitution of the United States.

IV

Statistical data pertinent to the within petition is as follows:

1. CARITATIVO's conviction of two murders was affirmed by this Court on automatic appeal on February 1, 1956.

People v. *Caritativo*, 46 A. C. 67

2. Petition for rehearing denied February 29, 1956.

3. Petition for Certiorari in the Supreme Court of the United States denied June 4, 1956.

4. Death penalty imposed June 18, 1956, and date of execution set for August 31, 1956.

5. Petition for Writ of Mandate in the Superior Court of Marin County seeking to compel the Warden to institute proceedings to determine present sanity of CARITATIVO filed August 30, 1956, and denied on same date.

6. Appeal from denial of petition for Writ of Mandate filed in the Supreme Court of California on August 31, 1956, and stay of execution pending appeal granted.

3 7. Appeal dismissed by this court on November 20, 1956, and remittitur issued forthwith.

Caritativo v. *Teets*, 47 A. C. 308

8. On January 29, 1957, a petition for Certiorari was filed in the Supreme Court of the United States challenging the constitutionality of the above mentioned decision of the Supreme Court of California in the Mandamus proceedings. On the same date a stay of execution was ordered by Justice William O. Douglas. On February 25, 1957, the petition for Writ of Certiorari was denied.

Caritativo v. *California*, No. 561 Misc. October Term 1956

9. A new and presently existing date of execution has been set and the present death date is May 24, 1957.

V

The illegality complained of arises from the following facts:

1. It is the opinion and belief of your petitioner that CARITATIVO is presently insane and therefore not subject to execution under California Law.

2. CARITATIVO's custodian, the Warden of San Quentin Prison, has reason to believe that said CARITATIVO is presently insane and therefore not subject to execution under California Law.

3. The Warden of San Quentin Prison, although requested to do so, has arbitrarily refused to institute proceedings to determine the present sanity of CARITATIVO in accordance with the provisions of Section 3700 and 3701 of the California Penal Code.

4. Unless ordered to do so, the Warden will persist in his refusal to institute proceedings to determine the present sanity of CARITATIVO, and as a result said CARITATIVO, who is presently insane, will be put to death on May 24, 1957, in violation of his rights under California Law and as guaranteed by the Constitution of the United States.

As an additional and separate ground for the issuance of a Writ of Habeas Corpus, petitioner alleges the following:

I

CARITATIVO's trial for two murders began before a Jury in Marin County on January 6, 1955. At that time his counsel had entered a plea of not guilty on his behalf, and this was the sole issue at the trial. Subsequently, on or about January 10, 1955, after the selection of the Jury and opening statements by counsel for the prosecution and for the defense, and the testimony of several prosecution witnesses, CARITATIVO demanded in open court the right to change counsel on the grounds he had lost his faith and trust in his then counsel. After several days of discussion and hearings in Chambers, out of the presence of the Jury, the Trial Court dismissed CARITATIVO's counsel, who had represented him up to that moment, and appointed two new attorneys to represent CARITATIVO during the remainder of the trial.

A short continuance was granted, motions for mistrial were denied, and the trial proceeded. On February 28, 1955, the Jury found CARITATIVO guilty on both counts of murder and made no recommendation, thereby subjecting him to the punishment of death on each count.

II

Following the verdict of the Jury, but before pronouncement of judgment, CARITATIVO's newly appointed counsel made a formal plea to the court to be allowed at that time, and before sentence was pronounced, to enter a plea of not guilty by reason of insanity in order that a trial on said issue

might be had either before the same Jury, or a new Jury sworn for that purpose. Argument was heard and the motion was denied. At the same time a motion was also made for a trial of the defendant on the grounds of presently existing insanity, and the Trial Court likewise denied said motion. (See Transcript on Pages 3956–3959). Thereupon the court pronounced judgment and sentenced CARITATIVO to death.

III

It is the contention of petitioner that under the circumstances of this case it was a violation of CARITATIVO's rights under the 14th Amendment to the Constitution of the United States to deny him any opportunity to be tried upon the plea of not guilty by reason of insanity. It is true that his first counsel had failed to enter said plea on his behalf and had they continued as his counsel throughout the trial it might be said that he was bound by such failure. However, when the Court granted his motion for a change of counsel and gave him two new attorneys, it was the deprivation of fundamental rights for said Court to refuse to allow said CARITATIVO to be effectively represented by the newly appointed counsel who sought to obtain a trial for said CARITATIVO on the plea of not guilty by reason of insanity.

IV

The posture of the trial after the appointment of new counsel, insofar as the time for the entrance of a plea of not guilty by reason of insanity, was unique and unprecedented. The Jury had been selected and the trial began. Therefore an effective plea of not guilty by reason of insanity could not have been entered in the course of the then proceeding trial because there could be no opportunity to examine said jurors on voir dire examination. The only way defendant's rights could be protected would be for the Court to have granted a mistrial and to have begun again with the selection of a new Jury. This the Court refused to do. It was the position of the Court that defendant's rights would be protected by the entry of a plea of not guilty by reason of insanity at any time prior to the rendition of a verdict on the not guilty plea. CARITATIVO's counsel could not follow such procedure,

because under the circumstances of the case to have entered such a plea after the commencement of the trial
7 and without voir dire examination of the jurors and after the dismissal of previous counsel, would have been tantamount to a plea of guilty on the main trial with nothing left for the Jury but a trial on the issue of insanity.

V

The above was brought to the attention of the Court, in Chambers, but the Court nevertheless took the position that the plea of not guilty by reason of insanity would have to be entered during the course of the trial and before the verdict of the Jury or not at all. Counsel for CARITATIVO took the position that irreparable harm and prejudice would result to the defendant by entering the plea before the rendition of a verdict, but on the contrary that the entry of the plea of not guilty by reason of insanity after the verdict and before judgment would be the only way it could be done without completely violating the defendant's rights.

VI

As a result of the foregoing CARITATIVO was denied the right to a trial on a plea of not guilty by reason of insanity, and to this date has never had such a trial on such plea.

WHEREFORE, petitioner prays as follows:

1. That a Writ of Habeas Corpus may issue directed to HARLEY O. TEETS, commanding him that he have the body of said CARITATIVO, by him imprisoned, detained and restrained, before this Honorable Court at a time and
8 place to be therein specified, and for such other relief as the Court may deem meet and proper in the premises.

2. That this Court issue a stay of execution pending the determination of the above and that CARITATIVO's execution now scheduled for May 24, 1957, be stayed until further order of this court.

Dated: May 7th, 1957

(S) George T. Davis
GEORGE T. DAVIS
Attorney for Bart Luis Caritativo

9 Duly sworn to by George T. Davis, Jurat Omitted in Printing.

10 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

IN RE CARITATIVO ON HABEAS CORPUS

Order denying Petition for Writ of Habeas Corpus and Application for Stay of Execution—Filed May 8, 1957.

Petition for writ of habeas corpus and application for stay of execution DENIED.

This order is final forthwith.

(FILE ENDORSEMENT OMITTED)

11 SUPREME COURT OF CALIFORNIA

Clerk's Certificate to Record

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, hereby certify that the annexed is a true and correct copy of the record in the above entitled proceeding, as shown by the records of my office, and includes the following:

Petition for Writ of Habeas Corpus, filed May 7, 1957.

Order Denying Petition for Writ of Habeas Corpus, filed May 8, 1957.

WITNESS my hand and the seal of the court this 3d day of June, 1957.

WILLIAM I. SULLIVAN,
Clerk of Supreme Court of the State of California.
By: HARRY M. GARDISER,
Chief Deputy.

12 SUPREME COURT OF THE UNITED STATES

No. 129 Misc. October Term 1957

ORDER GRANTING PETITION FOR CERTIORARI AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

October 21, 1957

On petition for writ of Certiorari to the Supreme Court of the State of California.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 561 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

OCTOBER 21, 1957.

U. S. GOVERNMENT PRINTING OFFICE 1958

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 561

BART LUIS CARITATIVO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA and FRED R. DICKSON, Warden, California State Prison at San Quentin, California,

Respondents.

PETITIONER'S OPENING BRIEF

GEORGE T. DAVIS
111 Sutter Street
San Francisco 4, California
Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 561

BART LUIS CARITATIVO,

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vs.

HE PEOPLE OF THE STATE OF CALIFORNIA, and FRED R. DICKSON, Warden, California State Prison at San Quentin, California,

Respondents.

PETITIONER'S OPENING BRIEF

Opinion of the Court Below

The Supreme Court of the State of California in rendering its Order of May 8, 1957, did not file an opinion. The order of that court appears in the Transcript of Record page 6.

It is brief and provides:

"Petition for writ of habeas corpus and application for stay of execution DENIED.

"This order is final forthwith."

The opinion is reported as follows: *Caritativo* v. *Teets*, 48 A.C. 11 (Minutes, May 8, 1957).

Jurisdiction

The above quoted judgment of the Supreme Court of California was pronounced and entered on May 8, 1957.

In view of the finality with which the judgment was entered, no rehearing was sought.

The Petition for Writ of Certiorari herein was filed on August 1, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. A., Sections 1257(3) and 2101(e).

The basic ground under which the jurisdiction of this Court is invoked is the denial of the constitutional rights of Bart Luis Caritativo, hereinafter called petitioner, under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Constitutional Provisions and Statutes Involved

1. **As to the constitutionality of the California procedure as it concerns the sanity of a person subject to execution:**

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America.

The statutory provisions of the State of California relating to the punishment (execution) of insane persons and to the authority of a warden of the state prison to suspend or not suspend the execution of a defendant under judgment of death are Section 1367 and Sections 3700 through 3706 of the Penal Code of the State of California.

Section 1367 of the California Penal Code provides:

> "Sec. 1367. Insane Immune from Trial or Punishment.—A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

The sections of said Penal Code pertinent to the questions here involved are Sections 3700 and 3701, which provide:

> "Sec. 3700. Death Sentence—Suspension.—No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.
>
> "Sec. 3701. Suspension by Warden for Insanity—Notice to District Attorney—Petition—Jury.—If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry."

2. **As to the constitutionality of the California law and procedure thereunder whereby petitioner was not permitted to enter a plea of not guilty by reason of insanity at the end of the trial of his case in the California Superior Court and prior to judgment:**

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America.

The statutory provisions of the State of California relating to this subject are Sections 1016 and 1026 of the Penal Code of the State of California, which provide as follows:

> "Sec. 1016. Five Pleas Allowable.—There are five kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court:
>
> 1. Guilty.
>
> 2. Not guilty.
>
> 3. A former judgment of conviction or acquittal of the offense charged.
>
> 4. Once in jeopardy.
>
> 5. Not guilty by reason of insanity.
>
> A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged."

"Sec. 1926. Procedure on Plea of Not Guilty Because Insane.—When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the State hospital for the criminal insane, or if there be no such State hospital, then that he be confined in some other State hospital for the insane . . ."

Questions Presented

1. **As to the constitutionality of the California procedure as it concerns the sanity of a person subject to execution:**

a. May the life of an insane prisoner under sentence of death be taken by a state as the result of the unreviewable ex parte determination of the crucial fact of sanity made by a single executive officer? Or, stated differently,

b. Are the California courts wholly without power to correct an executive agent's abuse of authority in a matter of such great significance as the execution of insane persons?

In his brief in opposition to the Petition for Writ of Certiorari, page 2, respondent states the question presented as follows: "Is California procedure, which provides no review of the warden's determination of a condemned inmate's sanity, constitutional?" We believe this question more properly stated should read: Does the failure of the California courts to grant a review of the warden's arbitrary and capricious ex parte determination of a condemned inmate's sanity constitute a denial of due process of law?

2. **As to the constitutionality of the California law and procedure thereunder whereby petitioner was not permitted to enter a plea of not guilty by reason of insanity at the end of the trial of his case in the California Superior Court and prior to judgment:**

Did the trial court in this case by construing the meaning and procedure required under the California dual plea statute in such manner as to result in a refusal to allow petitioner to enter a plea of not guilty by reason of insanity

and be tried on said issue after verdict of guilty on the issue of not guilty, but before judgment entered thereon, constitute a denial of due process of law?

Statement of the Case

Petitioner's trial for two murders began before a jury in Marin County, California, on January 6, 1955. At that time his counsel had entered a plea of not guilty on his behalf, and this was the sole issue at the trial. Subsequently, on or about January 10, 1955, after the selection of the jury and opening statements by counsel for the prosecution and for the defense, and the testimony of several prosecution witnesses, petitioner demanded in open court the right to change counsel on the grounds he had lost his faith and trust in his then counsel. After several days of discussion and hearings in Chambers, out of the presence of the jury, the trial court dismissed petitioner's counsel, who had represented him up to that moment, and appointed two new attorneys to represent petitioner during the remainder of the trial. A short continuance was granted, motions for mistrial were denied, and the trial proceeded. On February 28, 1955, the jury found petitioner guilty on both counts of murder and made no recommendation, thereby subjecting him to the punishment of death on each count.

Following the verdict of the jury, but before pronouncement of judgment, petitioner's newly appointed counsel made a formal plea to the court to be allowed at that time, and before sentence was pronounced, to enter a plea of not guilty by reason of insanity in order that a trial on said issue might be had either before the same jury or a new jury sworn for that purpose. Argument was heard and the motion was denied. At the same time a motion was also made for a trial of petitioner on the grounds of

presently existing insanity, and the trial court likewise denied said motion. Thereupon the court pronounced judgment and sentenced petitioner to death. (Reporter's Transcript 3956-3959.)

Thereafter petitioner was confined and is presently confined in the California State Prison at San Quentin, California.

Subsequently and prior to the date set for execution, petitioner's counsel filed a Petition for Writ of Mandamus in the Superior Court of the State of California, in and for the County of Marin, alleging that petitioner was insane and requesting the court to review the action of the warden in failing to invoke the statutory procedures provided under California law in such cases.

The Marin County Superior Court denied the Petition for Mandamus and an appeal was taken to the California Supreme Court. The California Supreme Court affirmed the dismissal of the Petition for Writ of Mandamus, holding that there is no provision for judicial review under California law of the warden's determination of the defendant's sanity. Two justices dissented, implying that the remedy is not by mandamus but rather by habeas corpus. *Caritativo* v. *Teets*, 47 Cal. 2d 304.

Thereafter Certiorari was denied by this Court. *Caritativo* v. *California*, No. 561 Misc., October Term 1956.

Thereafter petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court, which was denied without opinion on May 8, 1957. (Transcript of Record 1-5.)

Thereafter and prior to the filing in this Court of a Petition for Writ of Certiorari to the Supreme Court of the State of California to review the aforesaid denial of Habeas Corpus, a Petition for Habeas Corpus was filed in

the District Court of the United States for the Northern District of California, Southern Division. A copy of said Petition is appended hereto as Exhibit 1.

On May 23, 1957, United States District Judge Oliver J. Carter filed a Memorandum denying petitioner's second ground for relief, to wit, alleged denial of due process of law because petitioner was not permitted to enter a plea of not guilty by reason of insanity at the trial of his case in the Superior Court, but holding that the first ground for relief, going to the question of the constitutional rights of petitioner which come into play upon the allegation of post-conviction insanity, presents a more serious question. After reviewing the decisions on the subject, Justice Carter granted a stay of execution and held that the constitutional issues involved had not necessarily been resolved by the *Solesbee* case (*Solesbee* v. *Balcom*, 339 U. S. 9 at 12), and accordingly issued an order to show cause. A copy of said Memorandum Opinion is appended hereto as Exhibit 2.

On June 21, 1957, Justice Carter filed a Memorandum and Order dismissing the Petition for Habeas Corpus for the reason that petitioner had failed to exhaust his state remedies. A copy of said Memorandum and Order is appended hereto as Exhibit 3.

Thereupon petitioner filed a Petition for Writ of Certiorari in this Honorable Court, and Certiorari was granted October 21, 1957.

Argument

1. As to the constitutionality of the California procedure as it concerns the sanity of a person subject to execution:

After petitioner's conviction on two counts of murder he was sentenced to death. The judgments of guilt and sentences of death were affirmed on appeal. *People* v. *Caritativo*, 46 Cal. 2d 68. This Court denied Certiorari. *Caritativo* v. *Teets*, 793 Misc., October term 1955.

Petitioner has been confined at San Quentin Prison, California, since the sentences of death were pronounced, and is presently there awaiting execution except for the outcome of this proceeding.

During his confinement at San Quentin Prison petitioner was visited, talked to and observed by his counsel, who concluded that petitioner was obviously and patently mentally ill and presently insane. His attorney called the attention of the warden to petitioner's mental condition orally and by letter, and was informed by the warden that no proceedings would be taken as provided by California law in such circumstances. California Penal Code, Sections 1367, 3700 and 3701. Petitioner's counsel then asked the warden for an opportunity to read and review the prison psychiatric reports on petitioner, and this request was denied. Petitioner's counsel also asked the warden for permission to have a privately hired psychiatrist read and review the prison psychiatric records on petitioner and make a psychiatric examination of petitioner in order that his counsel might be fully advised as to the petitioner's mental condition. This was also refused.

Petitioner's counsel then filed a Petition for a Writ of Mandamus in the California Supreme Court alleging the

foregoing facts and declaring that in his opinion petitioner was and is presently insane, and asked for an order of court requiring the warden to perform his duties as set forth by law. This petition was based on the authority of *Phyle* v. *Duffy*, 334 U. S. 431 at 444-445, in which this Court in a proceeding somewhat similar to the present one denied certiorari in a habeas corpus proceeding because the Attorney General of California stated to this Court during the hearings that habeas corpus was not the proper remedy in California, but mandamus was and is the proper remedy. Accordingly this Court held as follows:

> "The court now finds that all that the California Supreme Court did was to hold that as a matter of California procedure, the petitioner's claim could not be passed on by the direct remedy of habeas corpus, but that there is available a special local remedy, labeled mandamus, whereby the petitioner can judicially test his present sanity . . . Whatever may be the elegancies of procedure by which the matter is to be determined, our decision declining to consider the grave constitutional issues which we thought we had before us, is contingent upon a determination by the Supreme Court of California that the law of that state is what our decision presupposes it to be, namely, that California by a remedy which California chooses to call mandamus enables the present petitioner to secure a judicial determination of his present sanity. This means, of course, not the very restricted scope of relief which is normally associated with the traditional remedy of mandamus. It presupposes that California affords petitioner the means of challenging in a substantial way the ex parte finding of the Superintendent of the State Hospital . . . and enables him to secure judicial determination of the claims he has made in

his petition for habeas corpus, which, so the court now holds, is not the proper way to proceed.

". . . In this situation, we find no federal constitutional question presented, which is ripe for decision here." *Phyle* v. *Duffy*, *supra*.

It was on the basis of the above decision that petitioner sought relief by mandamus in the California Supreme Court, but that court denied the petition and held that mandamus was not available as a remedy. Two justices dissented however, and implied in their dissents that the remedy should be by habeas corpus. *Caritativo* v. *Teets*, 47 Cal. 2d 304. Certiorari was denied by this Court, *Caritativo* v. *California*, No. 561 Misc., October Term 1956.

Petitioner then sought relief by filing a Petition for Habeas Corpus in the Supreme Court of California, which petition was denied without opinion. *Caritativo* v. *Teets*, 48 A.C. 11 (Minutes May 8, 1957).

It is contended here that the failure of the California Supreme Court to grant petitioner a Writ of Habeas Corpus to compel the warden to take action under Section 3701 of the California Penal Code constitutes a denial of petitioner's right to due process of law under the Fourteenth Amendment of the Constitution of the United States. Petitioner contends that this view is supported not only by the decision of this Court in the case of *Phyle* v. *Duffy*, *supra*, but also by Memorandum and Order (Petitioner's Exhibit 2) of the United States District Court for the Northern District of California in *Caritativo* v. *Teets*, —— Fed. Supp. ——, in which District Judge Oliver J. Carter, on May 23, 1957, said:

"The first ground presents a more serious question, and goes to the question of the constitutional rights of petitioner which come into play upon the allegation of

post-conviction insanity. This question as it affects the California statutes was given careful attention by the Supreme Court of the United States in the case of *Phyle* v. *Duffy*, 344 U.S. 431, and by this Court in the case of *Application of Phyle*, 95 F. Supp. 555. Were it not for the recent decision of the Supreme Court of the State of California in *Caritativo* v. *Teets*, reported in 47 A.C. 308, the Phyle cases would have appeared to have disposed of this case. In the recent Caritativo decision the Supreme Court of California has overruled its prior decision in *Phyle* v. *Duffy*, 34 Cal. 2d 144, and now holds that mandamus is not a proper vehicle for asserting the right here involved. This reversal of position by the California Supreme Court requires this Court to again consider all of the constitutional questions which were before the United States Supreme Court in *Phyle* v. *Duffy*, 334 U.S. 431, and which were not reached because of the availability of the remedy of mandamus to a person in Phyle's position, and to a person now in the position of Caritativo.

"The State contends that the decision of the United States Supreme Court in *Solesbee* v. *Balcom*, 339 U.S. 9, which was decided subsequent to *Phyle* v. *Duffy* disposes of the issue adversely to petitioner. Without finally deciding the issue it is apparent that there are differences between the Georgia statute involved in the *Solesbee* case and the California statute involved in the *Phyle* case, and that there are factual differences which may distinguish the two cases, and that the same differences may exist between the *Solesbee* case and the *Caritativo* case. Therefore, at the present time this Court cannot say that the *Solesbee* case has resolved the constitutional issues adversely to the petitioner."

The State of California now proclaims in effect that it is wholly without power to correct an executive agent's abuse of authority in the matter of such significance as the execution of an insane person, no matter how arbitrary or capricious such abuse of authority may be. *Caritativo* v. *Teets*, 48 A.C. 11; *Rupp* v. *Teets*, 49 A.C., Minutes of August 27, 1957. We find it difficult to believe this to be the law, and we do not conclude that *Soleshee* v. *Balcom*, *supra*, so holds. If this be the law in California, then the California procedure under such circumstances is clearly unconstitutional and in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

To countenance such procedure is to violate one of the most fundamental and basic laws of society and humanity inherent in the civilized race from time immemorial. It is contrary to social and natural law to kill a man who has become insane.

On the facts herein alleged and also stated in the Petition for Writ of Habeas Corpus filed in the court below, which facts for our present purposes must be accepted as true, this is a clear situation wherein the State of California is about to take the life of a condemned man as to whom there is good reason to believe that he is now insane.

Justice and the constitutional requirements of due process demand that under such circumstances the warden be required to show cause why the condemned man shall not be executed.

2. **As to the constitutionality of the California law and procedure thereunder whereby petitioner was not permitted to enter a plea of not guilty by reason of insanity at the end of the trial of his case in the California Superior Court and prior to judgment:**

It is the contention of petitioner that under the circumstances of this case it was a violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States to deny him any opportunity to be tried upon the plea of not guilty by reason of insanity. It is true that his first counsel had failed to enter said plea on his behalf and had they continued as his counsel throughout the trial it might be said that he was bound by such failure. However, when the court granted his motion for a change of counsel and gave him two new attorneys, it was a deprivation of fundamental rights for said court to refuse to allow said petitioner to be effectively represented by the newly appointed counsel who sought to obtain a trial for said petitioner on the plea of not guilty by reason of insanity.

The posture of the trial after the appointment of new counsel, insofar as the time for the entrance of a plea of not guilty by reason of insanity, was unique and unprecedented. The jury had been selected and the trial began. Therefore an effective plea of not guilty by reason of insanity could not have been entered in the course of the then proceeding trial because there could be no opportunity to examine said jurors on voir dire examination. The only way petitioner's rights could be protected would be for the court to have granted a mistrial and to have begun again with the selection of a new jury. This the court refused to do. It was the position of the court that petitioner's rights would be protected by the entry of a plea of not guilty by reason of insanity at any time prior to the rendition of a verdict on the not guilty plea. Peti-

tioner's counsel could not follow such procedure because under the circumstances of the case to have entered such a plea after the commencement of the trial and without voir dire examination of the jurors and after the dismissal of previous counsel, would have been tantamount to a plea of guilty on the main trial with nothing left for the jury but a trial on the issue of insanity.

The above was brought to the attention of the court, in Chambers, but the court nevertheless took the position that the plea of not guilty by reason of insanity would have to be entered during the course of the trial and before the verdict of the jury or not at all. Counsel for petitioner took the position that irreparable harm and prejudice would result to the petitioner by entering the plea before the rendition of a verdict, but on the contrary that the entry of the plea of not guilty by reason of insanity after the verdict and before judgment would be the only way it could be done without completely violating the petitioner's rights.

As a result of the foregoing petitioner was denied the right to a trial on a plea of not guilty by reason of insanity, and to this date has never had such a trial on such plea.

CONCLUSION

It is respectfully submitted that the holding of the California Supreme Court in this cause be reversed as to each of the questions presented, separately and jointly, and that this cause be remanded to said court with a direction that an order issue directed to the respondents to show cause why the writ prayed for should not issue.

Dated: San Francisco, California
February 28, 1958

GEORGE T. DAVIS
Attorney for Petitioner

EXHIBIT 1

GEORGE T. DAVIS
98 Post Street
San Francisco 4, California
EXbrook 2-6788

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 36461

In the Matter of the Application of

BART LUIS CARITATIVO

For a Writ of Habeas Corpus.

HARLEY O. TEETS, Warden, California State Prison,
San Quentin, California, Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

The Petition of GEORGE T. DAVIS respectfully shows:

I

That he is the Attorney for the above-named BART LUIS CARITATIVO; and files this petition on behalf of said BART LUIS CARITATIVO.

II

That said CARITATIVO is imprisoned, detained and restrained of his liberty by HARLEY O. TEETS, Warden of the California State Prison at San Quentin, County of Marin, California, under commitments issued out of the Superior Court of the County of Marin, resulting from judgments imposing on two counts sentences of death.

III.

Petitioner alleges that said detention is and will continue to be unlawful, illegal and in violation of petitioner's rights to due process and equal protection of the law as guaranteed under the 14th Amendment of the Constitution of the United States unless the relief prayed for herein is granted.

IV

Data pertinent to the within petition is as follows:

1. CARITATIVO's conviction of two murders was affirmed by the California Supreme Court on automatic appeal on February 1, 1956.

People v. *Caritativo*, 46 A.C. 67

2. Petition for rehearing denied February 29, 1956.

3. Petition for Certiorari in the Supreme Court of the United States denied June 4, 1956.

4. Death penalty imposed June 18, 1956, and date of execution set for August 31, 1956.

5. Petition for Writ of Mandate in the Superior Court of Marin County seeking to compel the Warden to institute proceedings to determine present sanity of CARITATIVO filed August 30, 1956, and denied on same date.

6. Appeal from denial of petition for Writ of Mandate filed in the Supreme Court of California on August 31, 1956, and stay of execution pending appeal granted.

7. Appeal dismissed by the California Supreme Court on November 20, 1956, and remittitur issued forthwith.

Caritativo v. *Teets*, 47 A. C. 308

8. A new and presently existing date for execution was then set and CARITATIVO's *death date now is May 24, 1957.*

9. On January 29, 1957, a petition for Certiorari was filed in the Supreme Court of the United States challenging the constitutionality of the above-mentioned decision of the Supreme Court of California in the Mandamus proceedings. On the same date a stay of execution was ordered by Justice

William O. Douglas. On February 25, 1957, the petition for Writ of Certiorari was denied.

Caritativo v. *California*, No. 561 Misc. October Term 1956

10. On May 7, 1957, a petition for Writ of Habeas Corpus and Application for Stay of Execution was filed in the Supreme Court of the State of California and on May 8, 1957, that Court denied both, making its order final forthwith. The grounds for the petition in the California Supreme Court are identical with the grounds set forth herein as the basis for the writ applied for herein. Said grounds specifically set forth an alleged denial of due process of law and equal protection of the laws as guaranteed by the 14th Amendment of the Constitution of the United States.

V

The illegality complained of herein arises from the following facts:

1. It is the opinion and belief of your petitioner that CARITATIVO is presently insane and therefore not subject to execution under California Law.

2. CARITATIVO's custodian, the Warden of San Quentin Prison, has reason to believe that said CARITATIVO is presently insane and therefore not subject to execution under California Law.

3. The Warden of San Quentin Prison, although requested to do so, has arbitrarily refused to institute proceedings to determine the present sanity of CARITATIVO in accordance with the provisions of Sections 3700 and 3701 of the California Penal Code.

4. Unless ordered to do so, the Warden will persist in his refusal to institute proceedings to determine the present sanity of CARITATIVO, and as a result said CARITATIVO, who is presently insane, will be put to death on May 24, 1957, in violation of his rights under California Law and as guaranteed by the Constitution of the United States.

AS AN ADDITIONAL AND SEPARATE GROUND for the issuance of a Writ of Habeas Corpus, petitioner alleges the following:

I

CARITATIVO's trial for two murders began before a Jury in Marin County on January 6, 1955. At that time his counsel had entered a plea of not guilty on his behalf, and this was the sole issue at the trial. Subsequently, on or about January 10, 1955, after the selection of the Jury and opening statements by counsel for the prosecution and for the defense, and the testimony of several prosecution witnesses, CARITATIVO demanded in open court the right to change counsel on the grounds he had lost his faith and trust in his then counsel. After several days of discussion and hearings in Chambers, out of the presence of the Jury, the Trial Court dismissed CARITATIVO's counsel, who had represented him up to that moment, and appointed two new attorneys to represent CARITATIVO during the remainder of the trial. A short continuance was granted, motions for mistrial were denied, and the trial proceeded. On February 28, 1955, the Jury found CARITATIVO guilty on both counts of murder and made no recommendation, thereby subjecting him to the punishment of death on each count.

II

Following the verdict of the Jury, but before pronouncement of judgment, CARITATIVO's newly appointed counsel made a formal plea to the court to be allowed at that time, and before sentence was pronounced, to enter a plea of not guilty by reason of insanity in order that a trial on said issue might be had either before the same Jury, or a new Jury sworn for that purpose. Argument was heard and the motion was denied. At the same time a motion was also made for a trial of the defendant on the grounds of presently existing insanity, and the Trial Court likewise denied said motion. Thereupon the court pronounced judgment and sentenced CARITATIVO to death.

III

It is the contention of petitioner that under the circumstances of this case it was a violation of CARITATIVO's rights under the 14th Amendment to the Constitution of the United States to deny him any opportunity to be tried upon the

plea of not guilty by reason of insanity. It is true that his first counsel had failed to enter said plea on his behalf and had they continued as his counsel throughout the trial it might be said that he was bound by such failure. However, when the Court granted his motion for a change of counsel and gave him two new attorneys, it was the deprivation of fundamental rights for said Court to refuse to allow said CARITATIVO to be effectively represented by the newly-appointed counsel who sought to obtain a trial for said CARITATIVO on the plea of not guilty by reason of insanity.

IV

The posture of the trial after the appointment of new counsel, insofar as the time for the entrance of a plea of not guilty by reason of insanity, was unique and unprecedented. The Jury had been selected and the trial began. Therefore an effective plea of not guilty by reason of insanity could not have been entered in the course of the then proceeding trial because there could be no opportunity to examine said jurors on voir dire examination. The only way defendant's rights could be protected would be for the Court to have granted a mistrial and to have begun again with the selection of a new Jury. This the Court refused to do. It was the position of the Court that defendant's rights would be protected by the entry of a plea of not guilty by reason of insanity at any time prior to the rendition of a verdict on the not guilty plea. CARITATIVO's counsel could not follow such procedure, because under the circumstances of the case to have entered such a plea after the commencement of the trial and without voir dire examination of the jurors and after the dismissal of previous counsel, would have been tantamount to a plea of guilty on the main trial with nothing left for the Jury but a trial on the issue of insanity.

V

The above was brought to the attention of the Trial Court, in Chambers, but the Court nevertheless took the position that the plea of not guilty by reason of insanity would have to be entered during the course of the trial

and before the verdict of the Jury or not at all. Counsel for CARITATIVO took the position that irreparable harm and prejudice would result to the defendant by entering the plea before the rendition of a verdict, but, on the contrary, that the entry of the plea of not guilty by reason of insanity after the verdict and before judgment would be the only way it could be done without completely violating the defendant's rights.

VI

As a result of the foregoing, CARITATIVO alleges he was denied the right to a trial on a plea of not guilty by reason of insanity, and to this date has never had such a trial on such plea, which denial he alleges deprives him of his fundamental rights as guaranteed under the 14th Amendment to the Constitution of the United States.

WHEREFORE, petitioner prays as follows:

1. That a Writ of Habeas Corpus may issue directed to HARLEY O. TEETS, commanding him that he have the body of said CARITATIVO, by him imprisoned, detained and restrained, before this Honorable Court at a time and place to be therein specified, and for such other relief as the Court may deem meet and proper in the premises.

2. That this Court issue a stay of execution pending the determination of the above and that CARITATIVO's execution now scheduled for May 24, 1957, be stayed until further order of this Court.

Dated: May 21, 1957.

GEORGE T. DAVIS
George T. Davis
Attorney for Bart Luis Caritativo

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss.*:

GEORGE T. DAVIS, being first duly sworn, says:

That he is the attorney for BART LUIS CARITATIVO; that he knows the contents of the above petition to be true except as to those matters stated upon information or belief and that as to those matters he believes it to be true.

GEORGE T. DAVIS

Subscribed and sworn to before me
this 21st day of May, 1957.

(SEAL) RAY WOLINS
Notary Public in and for the City
and County of San Francisco, State
of California

My Commission Expires June 13, 1958.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 36461

In the Matter of the Application of

BART LUIS CARITATIVO

For a Writ of Habeas Corpus.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California.

MEMORANDUM

George T. Davis, as attorney for the above-named petitioner has filed a petition for a writ of habeas corpus and an application for a stay of execution.

The petition alleges two grounds for relief. The first ground is that the petitioner is presently insane, and is being held by the Warden at San Quentin Prison awaiting execution under a commitment and sentence from the Superior Court of the State of California in and for the County of Marin. The date of execution has presently been set for May 24, 1957. Upon this ground the petitioner alleges that the Warden has reason to believe that petitioner is presently insane, and, therefore, not subject to execution under California law, and that the Warden, although requested to do so, has arbitrarily refused to institute proceedings to determine the present sanity of petitioner in accordance with the provisions of Sections 3700 and 3701 of the California Penal Code.[1]

[1] §3700. Persons authorized to suspend execution

No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the

As a second ground for relief petitioner alleges he was denied due process because he was not permitted to enter a plea of not guilty by reason of insanity at the trial of his case in the Superior Court. For the purpose of this proceeding the Court does not consider the second ground to state any claim for relief, and would not warrant this Court staying the death sentence heretofore imposed. Without referring to all of the proceedings in petitioner's criminal case before the State courts, it is sufficient to state that he was aware of and could have presented this question on appeal from his judgment of conviction, and that he failed to do so. This Court will not permit the writ of habeas corpus to be substituted for the process of appeal, and therefore no relief will be granted upon this ground.

The first ground presents a more serious question, and goes to the question of the constitutional rights of petitioner which come into play upon the allegation of post-conviction insanity. This question as it affects the California statutes was given careful attention by the Supreme Court of the United States in the case of *Phyle* v. *Duffy*, 344 U.S. 431, and by this Court in the case of *Application of Phyle*, 95 F.Supp. 555. Were it not for the recent decision of the Supreme Court of the State of California in *Caritativo* v. *Teets*, reported in 47 A.C. 308, the Phyle cases would have appeared to have disposed of this case. In the recent Caritativo decision the Supreme Court of California has overruled its prior decision in *Phyle* v. *Duffy*, 34 Cal. 2d 144, and now holds that mandamus is not a proper vehicle

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State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.

§3701. Insanity; notice to district attorney; petition for inquiry; jury

If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry.

for asserting the right here involved. This reversal of position by the California Supreme Court requires this Court to again consider all of the constitutional questions which were before the United States Supreme Court in *Phyle* v. *Duffy*, 334 U.S. 431, and which were not reached because of the availability of the remedy of mandamus to a person in Phyle's position, and to a person now in the position of Caritativo.

The State contends that the decision of the United States Supreme Court in *Solesbee* v. *Balcom*, 339 U.S. 9, which was decided subsequent to *Phyle* v. *Duffy* disposes of the issue adversely to petitioner. Without finally deciding the issue it is apparent that there are differences between the Georgia statute involved in the *Solesbee* case and the California statute involved in the *Phyle* case, and that there are factual differences which may distinguish the two cases, and that the same differences may exist between the *Solesbee* case and the *Caritativo* case. Therefore, at the present time this Court cannot say that the *Solesbee* case has resolved the constitutional issues adversely to the petitioner.

Another question is presented from the petition. The petition alleges that on May 7, 1957, an identical petition for a writ of habeas corpus and application for stay of execution was presented to the Supreme Court of the State of California, and on May 8, 1957, that Court denied both without opinion, but making its order final forthwith. There is no allegation, and petitioner's counsel concedes that no petition for certiorari has yet been presented to the Supreme Court of the United States. This brings into play the question of exhaustion of state remedies, and the powers of this Court under Title 28 U.S.C. §2254. See: *Darr* v. *Burford*, 339 U.S. 200.

In a very recent opinion the Court of Appeals for the Ninth Circuit has discussed this question in *Dickson* v. *Castle*, —— F.2d ——, #15375, decided May 8, 1957. The question then is whether there are exceptional circumstances here present which will permit this Court to consider the petition for writ of habeas corpus, even though the state remedies have not been exhausted by petition for certiorari to the Supreme Court of the United States.

The special or exceptional circumstance given here is the impending execution of the death penalty before sufficient time had elapsed between the order of the Supreme Court of the State of California denying petitioner's petition for writ of habeas corpus and application for stay of execution and the execution date. This subject was discussed in *Thomas* v. *Duffy*, 191 F.2d 360, where the immediate pendency of execution was considered to be a special circumstance requiring the interposition of the powers of a Federal Court under Section 2254. While the factual situation here is much more questionable than that set forth in *Thomas* v. *Duffy* because of the greater lapse of time between the final order of the California Supreme Court and the date of execution there is still a question to be determined by this Court which should not be determined under the pressure of the time limitations created by the time set for execution.

Upon the filing of the petition in this case on the morning of May 22, 1957, an order to show cause was issued out of this Court setting the matter for hearing at three o'clock p.m. on May 22, 1957. At that hearing counsel for the State appeared and orally made a motion to dismiss, and counsel entered into a stipulation that petitioner was being held by the Warden of the California State Prison at San Quentin pursuant to a judgment and commitment of execution issued out of the Superior Court of the State of California in and for the County of Marin. No opportunity has been given for the preparation or presentation of a formal return by the State, or for a full and complete hearing on the issues presented by the petition and any return made thereto. It is the opinion of this Court that the stay of execution should be granted, and an order to show cause should be issued setting the matter down for hearing at a time when the record can be fully developed and more fully argued and presented by counsel.

An order in conformity herewith will be entered as of this date.

Dated: May 23, 1957.

OLIVER J. CARTER
United States District Judge

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 36461 Civil

BART LUIS CARITATIVO, Petitioner,

v.

HARLEY O. TEETS, Warden, California State Prison at San Quentin, Respondent.

MEMORANDUM AND ORDER

On May 22, 1957, a petition for habeas corpus and an application for a stay of execution was filed in this Court on behalf of Caritativo. An order to show cause issued, and return was made by the State of California on the afternoon of May 22, 1957. Petitioner sought in essence a judicial inquiry into the question of his sanity, and this Court was unable to summarily dispose of his right to such an inquiry in the light of the pertinent Supreme Court decisions. Thereupon this Court stayed the execution and set the matter down for further hearing. Further argument was then had on the legal issues raised by the petition and have been submitted to the Court for decision.

The initial question for decision here is whether this Court should dismiss the petition in view of the petitioner's failure to seek a review by the United States Supreme Court of the denial of his petition for habeas corpus by the California Supreme Court. Title 28 of the United States Code, §2254 provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence

of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

At the initial hearing in this matter counsel sought to circumvent the requirement of certiorari by his sworn statement to the effect that in the fourteen day interim between the denial of the petition by the State Court and the date set for execution, he was required to prepare briefs and submit argument to the United States Supreme Court in another case, and was thus unable to prepare Caritativo's petition before the time set for execution. The Court accepted that as a prima facie showing of an "exceptional circumstance", *Ex parte Hauk*, 321 U.S. 114 (1944), *Darr* v. *Burford*, 339 U.S. 200 (1950), and *Thomas* v. *Duffy*, 191 F.2d 360, upon which the execution should be stayed. However, the execution having been stayed, there no longer exists circumstances which render the process of exhaustion of state remedies ineffective to protect the rights of petitioner. The stay of execution issued by this Court had the effect of postponing the date set for execution by at least sixty days. California Penal Code §1227. The time needed to petitioner to perfect and file his petition for certiorari thereupon became available, and should be utilized accordingly.

Petitioner also argued at the subsequent hearings that where the State Court has decided that the remedy of habeas corpus is not available under State practice, it is unnecessary for him to ask the United States Supreme Court for certiorari in order to exhaust his State remedies. It is true that an absence of any kind of corrective remedy will obviate the need of first seeking certiorari; this is made clear by the language of Section 2254. But the Court is not prepared to rule at this time that no such remedy exists under the law of California to a person in the position of Caritativo. The holding of the California Supreme Court in *Caritativo* v. *Teets*, 47 A.C. 311, is an express overruling of its prior holding that mandamus was available, but it is not clear that the remedy of habeas corpus is also unavailable. Petitioner's subsequent application for habeas corpus to the California Supreme Court on

May 7, 1957, was denied without opinion; the basis of the denial not being clear, this Court is not in a position to proceed to the merits. In this posture of the case, there is every reason for him to first seek certiorari in the United States Supreme Court. See: *Dixon* v. *Duffy*, 342 U.S. 33 (1951), and *Dixon* v. *Duffy*, 344 U.S. 193. The ruling of that Court may well determine the unresolved questions, and end the necessity of seeking relief here.

It Is, Therefore, Ordered that the petition for habeas corpus be, and the same is hereby dismissed, the order to show cause heretofore issued is hereby discharged, and the stay of execution heretofore issued is hereby vacated and set aside.

Dated: June 21, 1957.

Oliver J. Carter
United States District Judge

Office - Supreme Court, U.S.
FILED
APR 3 1958
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 561

BART LUIS CARITATIVO,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, and FRED R. DICKSON, Warden of the California State Prison at San Quentin,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENTS.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Counsel for Respondents.

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In the Supreme Court
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Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

On May 8, 1957, the California Supreme Court denied Caritativo's petition for writ of habeas corpus without opinion.

On November 20, 1956, the California Supreme Court granted the State's motion to dismiss Carita-

tivo's appeal from an order denying a petition for a writ of mandate. Petitioner sought a writ of mandate to compel the warden to institute proceedings to determine his present sanity while awaiting execution, after the warden had determined that there was not "good reason to believe" Caritativo was presently insane. That opinion is reported as *Caritativo v. Teets*, 47 Cal.2d 304. This Court denied the petition for writ of certiorari on February 25, 1957. *Caritativo v. California*, 561 Misc., October Term, 1956.

QUESTIONS PRESENTED.

Is the California procedure which provides no judicial review of the warden's determination of a condemned inmate's sanity, constitutional?

Is the California procedural rule which requires the entry of a plea of not guilty by reason of insanity before commencement of trial, constitutional?

STATUTES INVOLVED.

The constitutionality of sections 3700, 3701 and 1016 of the California Penal Code are involved in this proceeding. These sections provide as follows:

> § 3700. No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.

§ 3701. If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry.

§ 1016. There are five kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court:

1. Guilty.

2. Not guilty.

3. A former judgment of conviction or acquittal of the offense charged.

4. Once in jeopardy.

5. Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged.

STATEMENT OF THE CASE.

Petitioner was convicted in the Superior Court of Marin County. The jury found petitioner guilty of murder in the first degree and petitioner was duly sentenced to death. The California Supreme Court on the automatic appeal affirmed the conviction. See *People v. Caritativo,* 46 Cal.2d 68.

Petitioner's execution was set for August 31, 1956. On August 30, 1956, Caritativo, through his counsel, filed a petition for writ of mandate in the Marin County Superior Court, seeking to compel the warden to institute proceedings to determine Caritativo's present insanity. The Superior Court denied the petition on the same date. The following day, August 31, petitioner filed a notice of appeal in the California Supreme Court and sought and obtained a stay of execution pending the appeal. The People filed a motion to dismiss the appeal supported by affidavits and on November 20, 1956, the California Supreme Court granted the motion to dismiss the appeal in an opinion reported as *Caritativo v. Teets,* 47 Cal.2d 304.[1]

This Court granted a stay of execution pending determination of the writ of certiorari. The petition for writ of certiorari was denied on February 25,

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[1]The portion of the opinion of the California Supreme Court discussing the facts in that case is printed as Appendix A to this brief. The affidavit of Warden Teets, filed in the California Supreme Court and a part of the record on certiorari to this Court, is printed as Appendix B to this brief for the convenience of the Court. These documents were before the California Supreme Court under the doctrine of judicial notice.

1957. *Caritativo v. California,* 561 Misc., October Term, 1956.

Thereafter, on May 7, 1957, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. On May 8, 1957, the California Supreme Court denied the petition without opinion. On May 22, 1957, petitioner filed a petition for writ of habeas corpus in the United States District Court and obtained a stay of execution. See *Caritativo v. Teets,* No. 36471 in the files of said District Court. Said Court discharged the order to show cause on the grounds that petitioner had not exhausted his State remedies by filing a petition for writ of certiorari.

Petitioner then filed a petition for writ of certiorari to review the California Supreme Court's denial of the petition for writ of habeas corpus.

STATEMENT OF FACTS.

In paragraph V of his petition for writ of mandate filed in the Marin County Superior Court, it was alleged on behalf of Caritativo that he was insane and summarized certain dreams which he had of a religious nature and it was the opinion of petitioner's counsel and an associated psychiatrist that Caritativo was presently insane. It was further alleged in this paragraph on behalf of the petitioner that petitioner was examined by a committee of three psychiatrists who reported to the warden that despite his dreams or visions, he was sane. It was also alleged that the

warden, relying upon the opinion of these three psychiatrists, had exercised his discretion and refused to certify that there was good reason to believe Caritativo to be insane.

In support of the motion to dismiss filed in the case of *People v. Caritativo*, reported as 47 Cal.2d 304, the warden of the prison submitted an affidavit which shows that periodically he had Caritativo examined as to his sanity (see Appendix B). The affidavit further shows that on four occasions the warden was advised that Caritativo was not insane, the last of these occasions being on August 7, 1956. The affidavit further discloses that George T. Davis, attorney for Caritativo, who filed these proceedings on his behalf, was advised as early as April 24, 1956, that the warden had been advised that Caritativo was sane and that he, the warden, would rely on the advice of the members of his staff as to the mental condition of Caritativo.

On September 1, 1957, Harley O. Teets, Warden of the California State Prison at San Quentin, died; thereafter Fred R. Dickson was duly appointed and is presently Warden of the California State Prison at San Quentin.

As indicated by the affidavit of Fred R. Dickson (Appendix C), it is the established procedure that in every death penalty case the warden requests a report of a neuropsychiatric committee within 60 days after the condemned inmate is received in the prison; that thereafter psychiatric reports are requested by the warden, depending upon the facts of the particular

case; however, in all cases, the warden requests a report from his psychiatric staff within 20 days of a scheduled execution. As recently as February 14, 1958, he has been advised in a report by three members of his medical-psychiatric staff that petitioner Caritativo is sane. See affidavit of Fred R. Dickson printed as Appendix C hereto.

Warden Dickson has no reason to believe that Caritativo is presently insane. Warden Dickson intends to follow the statutes of California and to institute proceedings to determine Caritativo's sanity pursuant to section 3701 of the Penal Code, if and when he has "good reason to believe" Caritativo is insane.

Petitioner alleges that he is presently insane and that the warden has good reason to believe that he is insane, and the warden has failed to institute proceedings pursuant to Section 3701 of the Penal Code to determine his sanity.

ARGUMENT.

I.

THIS COURT HAS JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF THE CALIFORNIA PROCEDURE FOR DETERMINING THE SANITY OF A CONDEMNED INMATE: THE QUESTION IS NOT MOOT.

The question of mootness immediately suggests itself in the present case. Harley O. Teets was Warden of the California State Prison at San Quentin at the time all of the proceedings with which we are concerned were instituted in the California Supreme

Court and at the time the petition for writ of certiorari was filed in this Court. However, on September 1, 1957, Warden Harley O. Teets died. On September 4, 1957, Fred R. Dickson was appointed and is presently the Warden of the California State Prison at San Quentin and has in his custody petitioner Caritativo.

It is the respondent's view that the present case is not moot. A real controversy exists between the parties. The question of the constitutionality of the California procedure remains at issue between the parties.

The petition for writ of habeas corpus filed in the California Supreme Court sought to compel Warden Teets to initiate proceedings to determine petitioner's sanity. This petition was denied.' Petitioner had previously sought a writ of mandate to compel Warden Teets to initiate proceedings to determine his sanity. The denial of the petition for writ of habeas corpus obviously followed the rule in the mandate action, *Caritativo v. Teets*, 47 Cal.2d 304. That decision expressly overruled the prior California cases in which the writ of mandate was used to review the warden's determination.

The question of the constitutionality of the California procedure remains regardless of the personal identity of the Warden of the California State Prison at San Quentin.

Furthermore, an actual controversy exists between the petitioner and the present warden, Fred R. Dickson. In support of the respondent's view that there

is an existing controversy and the case is not moot, Warden Dickson's affidavit is printed as Appendix C to this brief. As shown by Warden Dickson's affidavit, he had reviewed the prior psychiatric reports made to Warden Teets, and he has recently been advised by his medical-psychiatric staff that Caritativo is sane. Likewise, his personal observation supports the conclusion of the psychiatrists that Caritativo is sane, and he believes Caritativo is sane. The affidavit also establishes that Warden Dickson intends to follow the statutes of California and to institute proceedings to determine Caritativo's sanity pursuant to section 3701 of the California Penal Code, if and when he "has good reason to believe" Caritativo is insane.

Thus, an actual controversy continues to exist between the parties as to the present sanity of Caritativo. Also, the question remains whether or not California must provide a judicial review of the warden's determination that he "has no reason to believe" Caritativo is insane, or in the alternative, provide for an adversary hearing before the warden or other official to determine whether a condemned inmate is sane.

II.

THE CALIFORNIA PROCEDURE WHICH PROVIDES NO JUDICIAL REVIEW OF THE WARDEN'S DETERMINATION OF A CONDEMNED INMATE'S SANITY IS CONSTITUTIONAL.

A. The granting of reprieves for the reason that a condemned inmate has become insane is a matter of grace and not a requirement of due process.

Petitioner Caritativo asserts that he is presently insane and therefore not subject to execution under California law. Caritativo also alleges that the warden of San Quentin Prison had reason to believe that Caritativo is presently insane and that he refused to institute proceedings to determine his present sanity in accordance with section 3701 of the California Penal Code; that as a result he was denied due process of law.

California Penal Code section 3700 provides that no court, judge or officer, other than the Governor, can suspend the execution of a judgment of death except the warden of the state prison in certain situations. Section 3701 of the California Penal Code provides that if, after the delivery of a condemned inmate to the warden for execution there is good reason to believe that he had become insane, the warden must institute proceedings to determine his sanity. There is no judicial review of the warden's determination of petitioner's sanity. See *Caritativo v. Teets*, 47 Cal. 2d 304.

Likewise, Article VII of the California Constitution empowers the governor to grant reprieves, pardons and commutations of sentences. At common law the present insanity of a condemned inmate was a

legal cause of reprieve. This power was apparently exercised by the judiciary. See 2 Cooley's Blackstone 1524 (4th ed.). Indeed, Blackstone, in book 4 at page 396, concludes his discussion of reprieves for reason of insanity, with the following statement: ". ... And if he appears to be insane, the judge in his *discretion* may and ought to reprieve him" [Emphasis added]. Thus, where a suggestion of the insanity of a condemned person was made at common law after conviction and sentence, the judge was not required to proceed to summon a jury or to grant the reprieve, but he could take such action as in his discretion he deemed best. For discussion of the discretionary nature of the judicial reprieve at common law see *Nobles v. Georgia*, 168 U.S. 398, at 407-409.

However, both the United States and the California Constitutions have reposed the power to reprieve in the highest executive officer of the respective governments. See Article II, § 2, United States Constitution; Article VII, California Constitution. A similar provision is found in numerous other state constitutions. In both the United States and the California systems of government the power to reprieve is granted in the same breath as the power to pardon. The classification by the framers of the constitution of the power to reprieve with the power to commute and the power to pardon, is strong indication that the framers believed that the power to reprieve was a matter of grace. It is clear that they felt that the power to reprieve was related to the power to pardon and should be placed in the executive branch of the

government. The decision by this Court in *Solesbee v. Balkcom*, 339 U.S. 9, at 12, recognizes the relationship between executive clemency and the power to reprieve. This Court in the *Solesbee* case at page 11, stated as follows:

> "Postponement of execution because of insanity bears a close affinity not to trial for a crime, but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to pardon".

It is submitted that due process does not limit the power given to the governor to grant reprieves.

The Legislature need not repose the power to suspend the execution of a sentence in any other officer or court. It may, however, as a matter of legislative policy grant to agencies other than the governor the power to reprieve, even though the legislature is not required to do so. In California in addition to the governor's constitutional power to grant reprieves, the Legislature has given to the warden the power to grant a reprieve in the case of an insane condemned inmate. This power is related to the governor's power to reprieve and pardon, and likewise need not be subjected to judicial review. This Court arrived at a similar conclusion in *Solesbee v. Balkcom*, 339 U.S. 9 at page 12, where the Court stated

> "The power of executive clemency in this country undoubtedly derived from the practice as it has existed in England. Such power has traditionally rested in governors and the President, although

some of that power is often delegated to agencies such as pardon or parole boards. Seldom if ever has this power of executive clemency been subjected to review by the courts."

B. Due process at most requires that the power to grant a reprieve to a condemned inmate who has become insane be reposed in some officer or tribunal; due process does not require a jury trial or other adversary hearing to determine the question; the procedure used in California affords due process.

It might be conceded that the "Anglo-American concept of ordered liberty" contemplates that the power to reprieve a condemned inmate who has become insane be placed in some officer or tribunal. This power to reprieve has been given to the governor of California by the Constitution of California (Article VII); likewise, the Constitution of the United States and the constitutions of most states repose the power to reprieve in the chief executive officer. In this respect ever since we have been an independent nation the method and source of the power to reprieve has differed from the common law, since the power to reprieve was also a judicial power at common law. Thus, the power to reprieve in California is reposed by the Constitution in the Governor and by statute is reposed in the warden.

Due process does not require a separation of the powers or the assignment of the power to reprieve to a judicial officer. Indeed, the United States and numerous state constitutions expressly place this

power in an executive officer. In view of the fact that the power to reprieve is already reposed in the governor, the legislature would not be required to enact any statutes or set up any procedures concerning the exercise of the power to reprieve on the ground that a condemned inmate has become insane, although in California the Legislature has in addition granted such power to the warden.

Indeed, the constitutional grant of the power to the governor warrants the legislature in denying judicial or other officers, except the warden, the right to suspend the execution of the sentence of a judgment of death. California, by section 3700 of the Penal Code, has denied all other officers, judicial or executive, the power to suspend a sentence with the exception of the Governor and the warden.

Due process does not control the exercise of the power to reprieve. The power being granted by constitutional provision to the highest executive officer implies that the chief executive officer shall exercise such power in any manner he sees fit, with or without a hearing.

This Court early recognized that the procedures used by the President in exercising his power to grant reprieves was a matter entirely within his discretion. See *Ex parte William Wells*, 59 U.S. 307, 314-315, where the Court by way of *dictum* asserted as follows:

> "That [the power to grant reprieves] is not only to be used to delay a judicial sentence when the

President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis,* as where a female after conviction is found to be *enceinte,* or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used, to determine either of the two just mentioned, are clearly within the President's power to direct; . . ."

If due process strikes down the provisions of the state constitution or requires that there be a judicial review or a specific type of proceeding to determine the question of sanity by the person exercising the power to reprieve, then like restraints exist upon the power of the President of the United States by virtue of the due process clause of the Fifth Amendment. Due process does not control the pardoning power of the governor, even though that power may involve the innocence of the accused. It is difficult to see how it can logically be maintained that it is a denial of due process not to afford an adversary hearing as to the sanity of a condemned inmate, and yet contend that it is not a denial of due process if a condemned person is not afforded an adversary hearing on the question of his innocence when application is made for pardon.

The power to reprieve is the power to suspend a judgment temporarily and the reasons for reprieve

are in no way related to the validity of the judgment. We must assume the petitioner has been constitutionally convicted. Whether or not to relieve the defendant from the consequences of the judgment duly imposed by law is purely a matter of grace.

It should also be noted that the American Law Institute in its Code of Criminal Procedure, June 15, 1930, has adopted a procedure very similar to the procedure set out in Penal Code sections 3700 and 3701. Likewise, numerous states have dispensed with formal judicial hearings upon the issue of the present sanity. Thus, if due process is tested by the current practice in many states, and the current thinking is indicated by the American Law Institute Code of Criminal Procedure, then there is no denial of due process.

As has already been noted at common law the tribunal charged with the responsibility of granting reprieves was vested with broad discretion in deciding whether evidence should be heard. Likewise, at common law, the tribunal was empowered to determine the procedure to be utilized; that tribunal in its discretion decided whether or not a jury should determine the question of sanity of the condemned inmate. Thus, measured by the standards followed by "judicial" exercise of the power to reprieve at common law, there is no denial of due process by the procedure utilized in California. Indeed, the procedure used in California is not a denial of due process unless there be some distinction between the exercise of a power

by a judicial tribunal and the exercise of the identical power by an executive tribunal.

In California Caritativo may in a sense "review" the determination of the warden. If he is unsatisfied with the warden's determination he may always request the governor to exercise his constitutional power to grant reprieves pursuant to Article VII of the California Constitution. In California the Governor has a secretary whose primary responsibility is to pass upon requests for reprieves, pardons, commutations and extraditions. The Governor's office is always open to the suggestion that a reprieve ought to be granted in a particular case.

The procedure provided in California is a most logical procedure. Only the warden is in a position to determine immediately prior to an execution, the sanity of the condemned person. Since sanity is an ever-changing status, any adjudication by a judicial officer, a jury or other executive officer, would not be final unless a prisoner were executed immediately after determination of his sanity. However, not even in that case could we be certain that the person was sane at the time of the execution, since the person may have become insane while the jury or judicial officer was deliberating the question of his sanity. Indeed, the most logical and competent person to make the determination is the warden, who is charged with executing the judgment. The warden personally observes the sanity of the inmate and likewise obtains additional information from the observations by other

members of his staff, including reports filed by his psychiatric staff. In the present case both the personal observations of the warden and the observations of his psychiatric staff are that the petitioner Caritativo is and was sane.

Judicial review of the determination by the warden serves no purpose except to stifle the administration of justice. As was pointed out in *Solesbee v. Balkcom*, 339 U.S. 9, at 12:

> ". . . As was pointed out in the *Nobles* case [168 U.S. 398], to require judicial review every time a convicted defendant suggested insanity would make the possibility of carrying out a sentence depend upon 'fecundity in making suggestion after suggestion of insanity.' (Citing cases.) To protect itself society must have power to try, convict, and execute sentences."

The wisdom and foresight of this Court in both the *Solesbee* and *Nobles* decisions concerning the possibility of great delay in executing sentences is borne out by the record in the present case. In the present case a considerable period of time expired between the date of the judgment and the date when the petitioner first sought to compel the warden to initiate proceedings to determine petitioner's sanity by petition for writ of mandate. Furthermore, it should be noted that it was on August 30, 1956, *one* day prior to the date fixed for the execution that petitioner first filed a petition for writ of mandate which sought to compel the warden to initiate proceedings to deter-

mine his sanity. The delays in executing sentences which concerned this Court in the *Solesbee* and *Nobles* decisions are an existing reality.

III.

NO CONSTITUTIONAL QUESTION IS RAISED BY THE STATE PROCEDURAL RULE WHICH REQUIRES THE ENTRY OF A PLEA OF NOT GUILTY BY REASON OF INSANITY BY THE DEFENDANT BEFORE COMMENCEMENT OF THE TRIAL.

Appellant contends he was denied due process of law because after the verdict of guilty and before the verdict was entered he sought to enter a plea of not guilty by reason of insanity. The petition for writ of habeas corpus correctly recites that petitioner was represented in the early stages of the trial by different counsel and that at that time only a plea of not guilty was entered. The defendant, by failure to enter at the proper time the plea of not guilty by reason of insanity waived the right to enter such plea. The state statute requires the entry of plea before trial. Penal Code § 1016. The defendant was represented by counsel and failed to enter such plea. This failure results in a waiver of the right to enter the plea. Likewise, a reading of the opinion of the California Supreme Court, *People v. Caritativo*, 46 Cal.2d 68, reveals that this question was not discussed by the California Supreme Court. By his failure to raise this matter on appeal he has waived the contention since habeas corpus cannot do service as an appeal.

The application by the State Courts of these fundamental procedural rules is not a denial of due process. See *Brown v. Allen*, 334 U.S. 443, at 486, 503.

Dated, San Francisco, California,
April 1, 1958.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,

CLARENCE A. LINN,
Assistant Attorney General of the State of California,

ARLO E. SMITH,
Deputy Attorney General of the State of California,

Counsel for Respondents.

(Appendices A, B and C Follow.)

Appendix A

APPEAL from an order of the Superior Court of Marin County denying petition for writ of mandate and for an order directing issuance of remittitur. Appeal dismissed on motion.

Proceeding in mandamus to compel warden of state prison to institute proceeding for determination of sanity of a prisoner under sentence of death. Appeal from order denying writ, dismissed; stay of execution theretofore granted, terminated.

George T. Davis for Petitioner.

Edmund G. Brown, Attorney General, and Clarence A. Linn, Assistant Attorney General, for Respondent.

McCOMB, J.—This is a motion to dismiss an appeal from an order denying a petition for a writ of mandate and also for an order directing the issuance of the remittitur forthwith.

Chronology

i. Defendant's conviction of two first degree murders was affirmed by this court February 1, 1956. (*People v. Caritativo*, 46 Cal.2d 68 [292 P.2d 513].)

ii. Petition for a rehearing was denied February 29, 1956.

iii. Petition for a writ of certiorari was filed with the Supreme Court of the United States and denied June 4, 1956.

iv. On June 18, 1956, the death penalty was imposed on defendant and the date of execution set for August 31, 1956.

v. On April 27, 1956, George T. Davis, attorney for defendant, was informed that the prison psychiatrists were of the opinion defendant was sane.

vi. On May 24, 1955, three psychiatrists on the medical unit of the California State Prison at San Quentin, to wit, David G. Schmidt, M.D., Chief Psychiatrist, M. M. Kirksey, M.D., and M. D. Willcutts, M.D., Chief Medical Officer, advised the warden relative to defendant:

"We are agreed he has some expansive grandiose ideas and feelings of persecution; but no delusions or hallucinations are elicited and he knows the crime of which he was convicted and sentenced to execution and we are agreed he is not insane, albeit he has a Paranoid Personality with some Schizoid and some Neurotic Elements."

vii. On March 30, 1956, Dr. Willcutts, Dr. Schmidt and Dr. Kirksey, all on the prison staff, advised the warden relative to defendant:

"He shows he is oriented well in all spheres, that he has a good memory and still gives some evidence of some expansive grandiose ideas and feelings of persecution. He has a Paranoid Personality with some Schizoid and Neurotic elements; but we are all agreed that he is not insane."

viii. On May 2, 1956, Dr. Willcutts, Dr. Schmidt and A. D. Kopac, M.D., Psychiatrist, all on the prison staff, informed the warden relative to defendant:

"He knows the crime for which he is sentenced, but he does not know, or will not say definitely where his case is in the courts, but feels that Mr. Davis will take good care of his case.

"This subject has a good memory, he is oriented in all spheres, knows right from wrong, is aware of the crime for which he was sentenced and for which he faces execution. He exhibits some grandiose ideas and feelings of persecution, but we are all agreed that he is not insane. He has a paranoid personality with schizoid and neurotic elements."

ix. On August 7, 1956, Dr. Willcutts, Dr. Schmidt and Dr. Kopac advised the warden concerning defendant:

"This subject has a good memory, is oriented in all spheres. He knows right from wrong and is aware of the crime for which he was sentenced and for which he faces execution. He exhibits many grandiose ideas and feelings of persecution; but we are all agreed that he is not legally insane. He has a Paranoid Personality with many Schizoid and Neurotic Elements."

The record fails to disclose any evidence contradicting the findings of the doctors as set forth above.

x. On August 30, 1956, defendant filed a petition for a writ of mandate in the Superior Court of Marin County seeking to compel the warden of San Quentin penitentiary to institute proceedings to determine the present sanity of defendant. The writ was denied by the superior court on the same date and a notice of appeal immediately filed with this court. On August

31, 1956, a stay of execution pending the appeal from the order denying the petition for a writ of mandate was granted.

[Legal discussion omitted.]

Appendix B

In the Supreme Court of the State of California

S. F. No. 19,603

Bart Luis Caritativo,
Petitioner and Appellant,
vs.
Harley O. Teets, Warden, California State Prison at San Quentin,
Respondent and Appellee.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

State of California
City and County of San Francisco—ss.

Harley O. Teets, being first duly sworn deposes and says:

That he is and at all times mentioned in this affidavit has been the Warden of the California State Prison at San Quentin, California, and has had in his custody Bart Luis Caritativo.

That on the prison staff there is a medical unit on which there are a number of psychiatrists.

That these psychiatrists from time to time advise affiant as to the physical and mental condition of prisoners condemned to death.

That on May 24, 1955, David G. Schmidt, M.D., Chief Psychiatrist, M. M. Kirksey, M.D., Psychiatrist, and M. D. Willcutts, M.D., Chief Medical Officer, all on the staff of the prison, advised affiant concerning Bart Luis Caritativo as follows:

> "We are agreed he has some expansive grandiose ideas and feelings of persecution; but no delusions or hallucinations are elicited and he knows the crime of which he was convicted and sentenced to execution and we are agreed he is not insane, albeit he has a Paranoid Personality with some Schizoid and some Neurotic Elements."

That on August 7, 1956, M. D. Willcutts, M.D., Chief Medical Officer, David G. Schmidt, M.D., Chief Psychiatrist, and A. D. Kopac, M.D., Psychiatrist, all on the prison staff, advised affiant concerning Bart Luis Caritativo that:

> "This subject has a good memory, is oriented in all spheres. He knows right from wrong and is aware of the crime for which he was sentenced and for which he faces execution. He exhibits many grandiose ideas and feelings of persecution; but we are all agreed that he is not legally insane. He has a Paranoid Personality with many Schizoid and Neurotic Elements."

That on March 30, 1956, M. D. Willcutts, M.D., Chief Medical Officer, David G. Schmidt, M.D., Chief Psychiatrist, and M. M. Kirksey, M.D., Psychiatrist, all on the prison staff, advised affiant concerning Bart Luis Caritativo that:

"He shows he is oriented well in all spheres, that he has a good memory and still gives some evidence of some expansive grandiose ideas and feelings of persecution. He has a Paranoid Personality with some Schizoid and Neurotic elements; but we are all agreed that he is not insane."

That on May 2, 1956, M. D. Willcutts, M.D., Chief Medical Officer, David G. Schmidt, Chief Psychiatrist, and A. D. Kopac, M.D., Psychiatrist, all on the prison staff, advised affiant concerning Bart Luis Caritativo that:

"He knows the crime for which he is sentenced, but he does not know, or will not say definitely where his case is in the courts, but feels that Mr. Davis will take good care of his case.

"This subject has a good memory, he is oriented in all spheres, knows right from wrong, is aware of the crime for which he was sentenced and for which he faces execution. He exhibits some grandiose ideas and feelings of persecution, but we are all agreed that he is not insane. He has a paranoid personality with schizoid and neurotic elements."

That as early as April 24, 1956, George T. Davis, Attorney for Bart Luis Caritativo, contacted the officials at the prison and asked permission to have Dr. Bernard Diamond interview said Caritativo and was advised on or about April 27, 1956, that the prison authorities would not permit Dr. Diamond to interview said Caritativo.

That said George T. Davis was on April 27, 1956, given a copy of the conclusions of the prison psychiatrist concerning said Caritativo, which copy is attached to the petition herein.

That said George T. Davis was advised as early as the month of May, 1956, that affiant would rely on the advice of the members of his staff as to the mental condition of Bart Luis Caritativo.

Harvey O. Teets.

Subscribed and sworn to before me this 4th day of September, 1956.

/s/ Clarence A. Linn,
Assistant Attorney General.

Appendix C

AFFIDAVIT OF FRED R. DICKSON

State of California,
County of Marin—ss.

Fred R. Dickson, being first duly sworn, deposes and says:

That since September 4, 1957, he has been and is presently the Warden of the California State Prison at San Quentin, California, and has had in his custody Bart Luis Caritativo.

That on the prison staff there is a medical unit on which there are a number of psychiatrists; that the procedure established and followed requires a psychiatric report of condemned prisoners to be filed by the psychiatric staff with the warden within 60 days after receipt of the condemned prisoner at the institution. That thereafter the warden requests such psychiatric examinations as he deems advisable and that in all cases a psychiatric report of a condemned inmate's mental condition is made by the psychiatrists to the warden within 20 days of the scheduled execution.

That he has reviewed the prior psychiatric reports made to Warden Teets; that on February 14, 1958, David G. Schmidt, M.D., Chief Psychiatrist; M. D. Willcutts, M.D., Chief Medical Officer and A. D. Kopac, M.D., Psychiatrist II, all on the prison staff, advised affiant concerning Caritativo, that Caritativo presents what appears to be continuing delusional

productions and a history of previous hallucinatory experiences of both an auditory and visual nature. He exhibits some grandiose ideas and feelings of persecution in association with this though content. He is mentally quite alert, and his intellectual production is in keeping with a high-normal intelligence with adequate grasp and comprehension of his environment and the material under discussion. He is oriented in all spheres—time, place and person. He is aware of the crime for which he was convicted and is sentenced to death. That the subject has a Paranoid Personality with Schizoid and Neurotic elements; but that he is not insane.

That your affiant has himself, personally, observed the conduct of Caritativo and that neither from the psychiatric reports, his own observation, nor the reports of his custodial staff has he any reason to believe that Caritativo is presently insane.

That your affiant intends to follow the statutes of California and to institute proceedings to determine Caritativo's sanity pursuant to section 3701 of the Penal Code, if and when he has "good reason to believe" Caritativo is insane.

FRED R. DICKSON.

[jurat on original]